purchased by Wal-Mart, which sent 3,696 of those bottles to its own distribution center in Opelousas, Louisiana.

Wal-Mart ordered Insta-Mix products entirely through an electronic transmission system known as Electronic Data Interchange ("EDI"). It took delivery of and title to the shipments at the Insta-Mix dock in Colorado Springs. Wal-Mart then shipped the bottles to various distribution centers throughout the United States. While Insta-Mix could have ascertained Wal-Mart's shipment destinations, it did not, and it did not otherwise direct any of its activities at Louisiana.

An intellectual property dispute arose between Insta-Mix and Respondent Luv n' Care, Ltd. ("Luv n' Care") regarding the bottle. Luv n' Care filed suit against Insta-Mix in the United States District Court for the Western District of Louisiana for copyright infringement under 17 U.S.C. §101 et seq. and for unfair competition and federal trademark dilution under Sections 43(a) and (c) of the Lanham Act (15 U.S.C. § 1125 (a), (c)). The magistrate judge recommended dismissing the suit for lack of personal jurisdiction, concluding that "[s]imply placing [a] product in the stream of commerce is not sufficient to create personal jurisdiction even if it were foreseeable that the product might end up in Louisiana." App. 3. The district court accepted the magistrate judge's recommendation and dismissed the suit without prejudice. *Id.* at 20-21.

In reviewing the lower court's order, the Fifth Circuit concluded that Insta-Mix's "only contact with Louisiana [was] its sales of items to Wal-Mart." *Id.* at 3. But the court reversed and held Insta-Mix subject to personal jurisdiction in Louisiana under the "stream of commerce" test applied in that circuit. In his specially concurring opinion, Judge DeMoss stated this case "reveals the flaws in" the "stream of

commerce" test. He further stated that the minimum contacts test is in a "state of complete disarray." *Id.* at 16. According to Judge DeMoss, this decision creates a "Wal-Mart exception" that "render[s] any small company that sells a product to Wal-Mart subject to suit in any state in the nation in which Wal-Mart resells the company's products." *Id.* at 17. Notwithstanding his concurrence, he agreed with the Fourth Circuit, which stated that "[t]o permit a state to assert jurisdiction over any person in the country whose product is sold in the state simply because a person must expect that to happen destroys the notion of individual sovereignties inherent in our system of federalism." *Lesnick v. Hollingsworth & Vose Co.*, 35 F.3d 939, 945 (4th Cir. 1994). Judge DeMoss pointed out that none of the "plus" factors under the *Asahi* "stream of commerce plus" test are present and that "[t]his result on this record defies principles of federalism and therefore presses for the repudiation of the 'stream of commerce' approach to personal jurisdiction." App. 17.

REASONS FOR GRANTING THE PETITION

1. Review by the Court Is Necessary to Resolve an Irreconcilable and Entrenched Conflict in the Courts of Appeal and the State Courts Regarding a Significant Issue of Federal Law

The conflict arises because some circuits (and states) have followed Justice Brennan's plurality opinion in *Asahi*, while other circuits (and states) have followed Justice O'Connor's plurality opinion in *Asahi*. Justice Brennan's plurality opinion followed the dicta in *World-Wide Volkswagen*, which stated that "[t]he forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum

State." *World-Wide Volkswagen*, 444 U.S. at 297-298. On the other hand, Justice O'Connor's plurality opinion concluded that "a defendant's awareness that the stream of commerce may or will sweep the product into the forum state does not convert the mere act of placing the product into the stream into an act purposefully directed toward the forum State." *Asahi*, 480 U.S. at 112.

Asahi involved three separate opinions. Justice O'Connor's plurality opinion applied a "stream of commerce plus" test and concluded that the defendant did not purposefully avail itself of the California market.[2] *Asahi*, 480 U.S. at 112-13. Justice Brennan's plurality opinion applied the "stream of commerce" test and concluded that the defendant did purposefully avail itself of the California market but that this was one of the "rare" cases where exercising personal jurisdiction would not meet the constitutional standards for fairness. *Id.* at 116. Justice Stevens's opinion applied a different test and also found that this was one of the few cases where fairness required a finding of no personal jurisdiction.[3] *Id.* at 121.

The Fifth, Seventh, and Eighth Circuits all use the "stream of commerce" test from Justice Brennan's plurality

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[2] In any event, Justice O'Connor's opinion concluded that personal jurisdiction in California would not have comported with constitutional standards of fairness under the facts of the case. *Id.* at 114.

[3] Justice Stevens's test was limited to products liability cases and held that whether a court had personal jurisdiction would depend on "the volume, the value, and the hazardous character of the components." *See Commissariat a l'Energie Atomique v. Chi Mei Optoelectronics Corp.*, 395 F.3d 1315, 1321 n.6 (Fed. Cir. 2005) (discussing Justice Stevens's *Asahi* concurrence).

opinion.[4] *Ruston Gas Turbines, Inc. v. Donaldson, Co.*, 9 F.3d 415, 420 (5th Cir. 1993); *Dehmlow v. Austin Fireworks*, 963 F.2d 941, 947 (7th Cir. 1992); *Barone v. Rich Brothers Interstate Display Fireworks, Co.*, 25 F.3d 610, 613-15 (8th Cir. 1994). On the other hand, the First, Fourth, Sixth, and Eleventh Circuits all use "the stream of commerce plus" test from Justice O'Connor's plurality opinion.[5] *Boit v. Gar-Tec Products, Inc.*, 967 F.2d 671, 683 (1st Cir. 1992); *Lesnick v. Hollingsworth & Vose Co.*, 35 F.3d 939, 945-46 (4th Cir. 1994); *Bridgeport Music, Inc. v. Still N the Water Publ'g*,

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[4] There is some confusion over what standard the Eighth Circuit uses. *See* Richard M. Elias, *In Search of a Broader Stream of Commerce Theory: The Eighth Circuit Streams Past Inconsistencies in Favor of Equitable Results*, 67 Mo. L. Rev. 99, 112-15 (2002) (noting that the Eighth Circuit seems to have switched from stream of commerce plus to stream of commerce). Based on *Falkirk Mining Co. v. Japan Steel Works, Ltd.*, 906 F.2d 369, 374 (8th Cir. 1990), the Fourth Circuit wrote that the Eighth Circuit uses the "stream of commerce plus" test. *Lesnick v. Hollingsworth & Vose Co.*, 35 F.3d 939, 945 (4th Cir. 1994). But based on *Barone v. Rich Brothers Interstate Display Fireworks Co.*, 25 F.3d 610, 615 (8th Cir. 1994), the Third Circuit wrote that the Eighth Circuit uses the "stream of commerce" test. *Pennzoil Prods. Co. v. Colelli & Assocs., Inc.*, 149 F.3d 197, 203 (3rd Cir. 1998). The cases since *Barone* have not cleared up the confusion, as some appear to use "stream of commerce plus," while others appear to use the "steam of commerce" test. *Compare Dever v. Hentzen Coatings, Inc.*, 380 F.3d 1070, 1075 (8th Cir. 2004) (appears to use stream of commerce plus), and *Stanton v. St. Jude Med., Inc.*, 340 F.3d 690, 694 (8th Cir. 2003) (same), *with Vandelune v. 4B Elevator Components Unlimited*, 148 F.3d 943, 948 (8th Cir.1998) (appears to use stream of commerce), and *Clune v. Alimak AB*, 233 F.3d 538, 543 (8th Cir. 2000) (same).

[5] There is also some confusion within the Eleventh Circuit regarding which test it uses. Although the Eleventh Circuit appeared to adopt the "stream of commerce plus" test in *Madara v. Hall*, 916 F.2d 1510, 1519 (11th Cir. 1990), a later case claimed that the Eleventh Circuit had not decided the issue. *Vermeulen v. Renault, U.S.A., Inc.*, 985 F.2d 1534, 1548 (11th Cir. 1993).

327 F.3d 472, 479-80, (6th Cir. 2003); *Madara v. Hall*, 916 F.2d 1510, 1519 (11th Cir. 1990). Other circuits have simply refused to decide which test to apply. *See, e.g., Pennzoil Products Co. v. Colelli & Assocs., Inc.*, 149 F.3d 197, 207 n.13 (3rd Cir. 1998) (finding jurisdiction under both "stream of commerce" and "stream of commerce plus" tests).

State courts are also deeply split on this issue. The following fifteen states appear to use the "stream of commerce plus" test: Alabama, Arizona, California, Colorado, D.C, Florida, Kentucky, Maryland, Michigan, Mississippi, New York, Ohio, Pennsylvania, Vermont, and Virginia.[6] The following six states appear to use the "stream of commerce" test: Georgia, Idaho, Minnesota, North Carolina, West Virginia, and Wisconsin.[7]

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[6] *Ex parte Alloy Wheels Int'l*, 882 So. 2d 819, 823 (Ala. 2003); *Rollin v. William V. Frankel & Co.*, 996 P.2d 1254, 1257-58 (Ariz. Ct. App. 2000); *Carretti v. Italpast*, 101 Cal. App. 4th 1236, 1249-1250 (2002); *Union Pacific R..R. Co. v. Equitas Ltd.*, 987 P.2d 954, 957 (Colo. Ct. App. 1999); *Holder v. Haarmann & Reimer Corp.*, 779 A.2d 264, 273 (D.C. 2001); *Kin Yong Lung Indus. Co., Ltd. v. Temple*, 816 So. 2d 663, 666 (Fl. Dist. Ct. App. 2002); *Halderman v. Sanderson Forklifts Co., Ltd.*, 818 S.W.2d 270, 274 (Ky. App. 1991); *Hollingsworth & Vose Co. v. Connor*, 764 A.2d 318, 330-31 (Md. App. 2000); *Witbeck v. Bill Cody's Ranch Inn*, 411 N.W.2d 439, 448 (Mich. 1987); *Sorrells v. R & R Custom Coach Works, Inc.*, 636 So. 2d 668, 674 (Miss. 1994); *Schultz v. Hyman*, 201 A.D.2d 956, 956 (N.Y. App. Div. 1994); *Sherry v. Geissler U. Pehr GmbH*, 651 N.E.2d 1383, 1388 (Ohio Ct. App. 1995); *Graham v. Machinery Distribution, Inc.*, 599 A.2d 984, 987 (Pa. Super. 1991); *Dall v. Kaylor*, 658 A.2d 78, 80 (Vt. 1995); *Sutherland v. Robby Thruston Carpentry, Inc.*, 2005 WL 545543, *3 (Va. Cir. Ct. 2005).

[7] *Continental Research Corp. v. Reeves*, 419 S.E.2d 48, 52-53 (Ga. Ct. App. 1992); *Noss v. Avatar Technology, Inc.*, 2002 WL 32103156 at *9 (Idaho Dist. 2002) (No. CV 2001-1391); *Juelich v. Yamazaki Mazak Optonics Corp.*, 682 N.W.2d 565, 571-72 (Minn. 2004); *Cox v. Hozelock, Ltd.*, 411 S.E.2d 640, 644 (N.C. App. 1992); *Hill v. Showa*

It is not even the case that the federal circuits apply the same test as their constituent states. *Cf.* Kaplan, 55 BAYLOR L. REV. at 544 (federal courts are not bound by state courts' "analysis of federal constitutional law"). For example, Georgia and West Virginia use the "stream of commerce" test, *Continental Research,* 419 S.E.2d at 52-53; *Hill*, 425 S.E.2d at 610, while the Eleventh and Fourth Circuits use "the stream of commerce plus" test. *Madara*, 916 F.2d at 1519; *Lesnick*, 35 F.3d at 945-46. Conversely, Mississippi uses the "stream of commerce plus" test, *Sorrells*, 636 So.2d at 674, while the Fifth Circuit uses the "stream of commerce" test. App. at 7. These anomalies have an enormous impact in the myriad cases where a product has been placed in the stream of commerce and diversity exists. Whether, for example, ***any*** court has personal jurisdiction in Georgia, Mississippi, and West Virginia in a diversity case would depend exclusively on the amount in controversy. In Mississippi, if the amount in controversy was under $75,000, no state court would have jurisdiction because Mississippi uses the "stream of commerce plus" test. Even though no state court would have personal jurisdiction, federal district courts would have jurisdiction if the amount in controversy was over $75,000 because the Fifth Circuit uses the "stream of commerce" test. The converse would be true in West Virginia and Georgia: a state court would have personal jurisdiction if the amount in controversy was under $75,000 because both states use the "stream of commerce" test, while if the amount in controversy was over $75,000, a federal district court would lack jurisdiction to hear the state law claim because both the Fourth and Eleventh Circuits use the "stream of commerce plus" test.

Denko, K.K., 425 S.E.2d 609, 610 (W. Va. 1992); *Kopke v. A. Hartrodt S.R.L.*, 629 N.W.2d 662, 672 (Wis. 2001).

It is fair to say, as the concurring Judge did here, that the minimum contacts test is now in a state of complete disarray. The Court should grant certiorari to define the contours of the due process requirements in this context.

2. The "Stream of Commerce Plus" Test Is Constitutionally Necessary

Defendants who sell their products to third parties and who have no contacts with the state forum (like petitioner) cannot be shown to have purposefully availed themselves of the benefits of doing business in that state. Simply put, the choice to do business in that state is not theirs. Yet the Court's interpretations of the Due Process Clause require that they be the ones who make that choice, for obvious reasons of anticipation and notice. "[T]he foreseeability that is critical to due process analysis is not the mere likelihood that a product will find its way into the forum State. Rather, it is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there." *World-Wide Volkswagon*, 444 U.S. at 297.

As one commentator explained, "Minimum contacts jurisdiction is based on a reciprocal relationship of mutual obligations and benefits as between the defendant and the forum." Kaplan, 55 BAYLOR L. REV. at 579. Thus, the "minimum contacts theory gives the defendant a choice: It can engage in conduct that gives rise to the quid pro quo or it can avoid the quid pro quo by refraining from such conduct." *Id.* Consequently, the "stream of commerce plus" test is constitutionally necessary because only this test allows defendants to choose whether to engage in conduct that would give the state jurisdiction over the defendant.

In addition, requiring a defendant to have minimum contacts for a state to have jurisdiction performs two related functions recognized by the Court. "It protects the defendant against the burdens of litigating in a distant or inconvenient forum. And it acts to ensure that the States, through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system." *World-Wide Volkswagen, 444* U.S. at 291-292. Only the "stream of commerce plus" test adequately performs both of these functions.

Conversely, the "stream of commerce" test performs neither of these functions. The "stream of commerce" test arose from dicta in *World-Wide Volkswagen.*[8] *See, e.g, Nelson v. Park Indus., Inc.*, 717 F.2d 1120, 1124-25 (7th Cir. 1983); Howard B. Stravitz, *Sayonara to Minimum Contacts: Asahi Metal Industry Co. v. Superior Court*, 39 S.C. L. Rev. 729, 761, 786, 788 (1988). The principal argument for the "stream of commerce" test is that a defendant who sells products and expects they will eventually reach the forum state receives an economic benefit from the sale. *Asahi*, 480 U.S. at 107. Consequently, the defendant should not be surprised if it is sued in the forum state. *Id.* But this test proves too much in the modern business world. Given the speed with which products move and the advent of world-wide Internet sales, manufacturers must anticipate that their products could be sold in any and every forum, no matter how far-flung. Accordingly, the "stream of commerce" test requires any manufacturer to submit to jurisdiction in any forum anywhere.

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[8] Although *World-Wide Volkswagen* involved an isolated occurrence relating to a dealer, the Court discussed the stream of commerce test in the context of activities by "a manufacturer or distributor such as Audi or Volkswagen." *World-Wide Volkswagen*, 444 U.S. at 297.

In this regard, the "stream of commerce" test allows states to act outside their "boundaries of state sovereignty." As the Fourth Circuit explained, "[t]o permit a state to assert jurisdiction over any person in the country whose product is sold in the state simply because a person must expect that to happen destroys the notion of individual sovereignties inherent in our system of federalism." *Lesnick v. Hollingsworth & Vose Co.*, 35 F.3d 939, 945 (4th Cir. 1994). Moreover, the "act of injecting a product into the economy is not, automatically and simultaneously, an act directed toward each and every state." Spalding, 4 Nev. L.J. at 162. Thus, a rule that creates jurisdiction merely based on the "act of injecting a product into the economy," *id.*, "obliterate[s] the distinction between what is national and what is local." *United States v. Lopez*, 514 U.S. 549, 557 (1995) (quoting *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937)).

The "stream of commerce" foreseeability test also fails miserably in the Internet era. For example, consider a company that advertises on its website but only sells through brick and mortar locations within State A. Although the company does not sell in State B, residents of that state may access the company's web site. Some of those residents cross state lines to buy products from the company in State A. Under a "stream of commerce" test, it is unclear whether State B would have jurisdiction. Courts would consider such issues as the dollar value of the product taken to State B, the volume of product taken to State B, and the knowledge of the company regarding where its purchasers are. Whether personal jurisdiction existed in a "stream of commerce" circuit would depend on the fact-specific answers to these questions (along with the idiosyncrasies of the judge applying the "stream of commerce" test). The "stream of commerce plus" test, by contrast, would establish a brighter line based on activities purposefully directed at the other

states, such as having a sales agent in State B, advertising directed toward State B or sending personnel to repair products in State B.[9]

Thus, the "stream of commerce plus" test fully complies with the principles of federalism. By requiring the actual defendant to take an action directed toward the forum state, it upholds the unique jurisdiction of each state. Spalding, 4 Nev. L.J. at 162. In addition, the "stream of commerce plus" test "protects the right of a defendant to voluntarily consent to, or withdraw its consent from any given state." *Id.* It does not rely on "open-ended and discretionary jurisdictional standards." Condlin, 54 CATH. U. L. REV. at 499. Instead, it points to objective measurements to decide whether the defendant purposefully availed itself of the forum state: "for example, designing the product for the market in the forum state, advertising in the forum state, establishing channels for providing regular advice to customers in the forum state, or marketing the product through a distributor who has agreed to serve as the sales agent in the forum State." *Asahi* 480 U.S. at 112.

A "stream of commerce plus" test that looks to purposeful direction creates, if not a bright-line rule, then a more certain line between conduct that constitutes purposeful availment and conduct that does not. Justice O'Connor's examples illustrate activities that are easy to identify and leave a paper (or electronic) trail that provides telling

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[9] The Court explained in *Burnham v. Superior Court of California*, 495 U.S. 604 (1990), that sometimes the "evils" of a "totality of the circumstances" test, namely "uncertainty and litigation over the preliminary issue of the forum's competence," must be tolerated in terms of jurisdiction based on physical presence in the forum state. *Id.* at 626-627 (citing *Asahi*, 480 U.S. at 115). But there is no reason to accept those "evils" here, where "stream of commerce plus" provides a much brighter line in deciding whether jurisdiction exists.

evidence of the relevant facts. Thus, the "stream of commerce plus" test identifies those who have purposely availed themselves of a state and is constitutionally required.

3. The Question Presented Is Critical to Predictability in the Conduct of Modern Business

"The Due Process Clause, by ensuring the 'orderly administration of the laws, gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.'" *World-Wide Volkswagen*, 444 U.S. at 297 (citation omitted). Thus, the minimum contacts test should provide certainty to those placing products in the stream of commerce. They should be able to plan for the potential of defending a suit in another state, or they should be able to avoid the necessary contacts with another state. Companies cannot plan if the applicable personal jurisdiction standards differ across the country.

The Fifth Circuit claimed that to avoid personal jurisdiction under the "mere foreseeability" of the "stream of commerce" test, Insta-Mix could have limited Wal-Mart's distribution to particular states. App. at 10, n.13. The Fifth Circuit was wrong. In the current legal environment, with so many conflicts among federal and state courts, it is virtually impossible for Insta-Mix to know where it can be sued. Consequently, the only way Insta-Mix could guarantee that it would not be sued in any given jurisdiction would be to go out of business. For example, as discussed *supra*, Mississippi uses the "stream of commerce plus" test. *Sorrells*, 636 So.2d at 674. But the Fifth Circuit uses the "stream of commerce" test. *Ruston Gas Turbines*, 9 F.3d at 420. Thus, if Insta-Mix had been sued on a state law claim

one state over, in Mississippi, there would ***not*** have been personal jurisdiction in a Mississippi state court if the amount in controversy was under $75,000, but there ***would*** have been jurisdiction in a Mississippi federal court if the amount in controversy was over $75,000. Thus, neither Insta-Mix nor any other business can do any more than guess where it could be sued under the current hodge-podge of "stream of commerce" versus "stream of commerce plus" jurisdictions.

Finally, even plaintiffs will benefit from a single national standard. "If a court lacks personal jurisdiction, it ... means that a subsequent federal court or the court of another state is not required to enforce [its] judgment." Moore's Federal Practice and Procedure §6.01[7]. Thus, without a uniform national standard, a plaintiff may not be able to have a judgment enforced if the judgment was entered by a state that uses the "stream of commerce" test but the enforcing state uses the "stream of commerce plus" test. *Cf. Griffis v. Luban,* 646 N.W.2d 527, 536-37 (Minn. 2002) (refusing to enforce a default judgment in Alabama lawsuit because Minnesota court found that Alabama court lacked jurisdiction due to what the Minnesota court believed was an incorrect interpretation of *Calder v. Jones,* 465 U.S. 783 (1984)). The nation needs one standard for personal jurisdiction.

4. This Case Is Particularly Well-Suited to Resolution of the Question Presented

The Fifth Circuit made it clear that under a "stream of commerce" test, a court would have jurisdiction over Insta-Mix. But as Judge DeMoss explained, there could not be jurisdiction under a "stream of commerce plus" test:

> Insta-Mix did no business in Louisiana; it had no agent for service of process in Louisiana; it negotiated a contract with Wal-Mart in Arkansas and it sold and delivered its products to Wal-Mart for its plant in Colorado; and Wal-Mart picked up Insta-Mix's products in Colorado on a Wal-Mart truck (or a truck contracted for by Wal-Mart). None of the plus factors defined by Justice O'Connor in *Asahi* are satisfied on the record here: Insta-Mix's product was not designed or designated for the Louisiana market; Insta-Mix did not advertise in Louisiana; Insta-Mix established no channels for providing regular advice to customers in Louisiana; and Insta-Mix did not market its product through a distributor who agreed to serve as a sales agent in Louisiana. *Asahi*, 480 U.S. at 112. ***In a stream-of-commerce-plus circuit, personal jurisdiction would not attach in this case...***

App. 17 (emphasis added).

Thus, this case is the appropriate vehicle for the Court to establish whether Justice Brennan's "stream of commerce" test or Justice O'Connor's "stream of commerce plus" test is the proper test to decide whether courts have personal jurisdiction over defendants who place products into the stream of commerce.

CONCLUSION

The petition for a writ of certiorari should be granted.

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